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CURRENT TOPICS.

There is a statute in Pennsylvania, designed for the protection of the traveling public, and, incidentally, of the railroads, making the sale of railroad tickets by an unauthorized person, or, as it is known in railway slang, "ticket scalping," a misdemeanor, and subjecting the scalper to fine and imprisonment. Act May 6, 1863, P. L. 582. Nothing in the language of the act forbids the *purchase* of such a ticket. But at least one of the roads, as appears from the facts contained in the recent decision of the Supreme Court in Sleeper v. Pennsylvania R. Co., attributed to this act the effect of nullifying and rendering void such a ticket in the hands of any purchaser for value. The plaintiff purchased a ticket from a scalper in New York, over the defendant's road to Philadelphia, and on its presentation was ejected from the cars at Elizabethtown. On an action for damages, it was urged that the ticket was bought from one who sold in violation of the Pennsylvania statute. It was not said that the vendor in New York was actually guilty of the statutory offense, but that the defendant being a corporation in Pensylvania, and the stipulated right of passage being partly in Pennsylvania, her courts would not enforce a contract resting upon acts which the legislature has declared criminal. The court ruled otherwise. Says Trunkey, J.: "Such tickets are evidence of the holder's title to travel on the railroad. Prior to the statute in Pennsylvania it was lawful for holders to sell them. The property in them passes by delivery. The act of 1863 confers no right upon a railroad company to question passengers as to where or how they procured tickets, or to eject them from the cars upon suspicion that the tickets were sold to them by a person who was not an agent for the company. At common law, which is deemed in force in absence of evidence to the contrary, the contract made by the plaintiff in New York was valid. It was executed. No part remained to be performed. It vested in him the evidence of title to a passage over the railroad. His act had no savor of illegality or immorality. It was a mere purchase of the obligation of a common carrier to carry the holder according to its terms. The defendant issued the obligation, received the consideration, and became liable for performance at the date of issue. As transferee, the plaintiff claimed performance. This is the contract which is the basis of the cause of action. It is purposely made so as to entitle the *bona fide* holder to performance, and for breach, to an action in his own name. Let it be assumed that the defendant made the contract in Pennsylvania, it is quite as reasonable to assume that tickets for passengers coming from New York into Pennsylvania were sold in New York. But wherever the contract was made, it is true, as claimed by the defendant, 'this action is to enforce, not the contract between the ticket scalper and the plaintiff in error, but between the defendant in error and the plaintiff in error.'"

An interesting discussion recently arose in a Wisconsin case on the subject of the duties of firemen with reference to the rescue of persons from burning buildings. The circumstances were these: During a conflagration which destroyed the principal hotel of Oshkosh, the Beckwith House, two several attempts were made by firemen to rescue a Mrs. Paige, who was in rooms on the fourth story. Both of these failed. Mrs. Paige's husband, the defendant, who was in the crowd below, then made in substance the following offer: "I will give $5,000 to any person who will bring the body of my wife out of that building, dead or alive." The plaintiff, Reif, who was an assistant engineer of the fire department, ascended the ladder, entered the room and brought out the body of Mrs. Paige, who had been burned to death. Upon the refusal of Mr. Paige to pay the reward, he brought suit. In the trial court, the plaintiff was nonsuited, principally upon the ground that inasmuch as he was an officer and paid member of the fire department, the rescue of Mrs. Paige's body, although accomplished at the imminent peril of his life, was within the scope of his official duty, for the performance of which he could not claim any bounty or reward. It was upon this point, too, that the

decision of the court above turned. It was conceded on the part of the plaintiff, that if the rescue of the remains of Mrs. Paige, at the peril of his life, was within the scope of his duty as fireman, he can not recover. Counsel for the defendant, while not contending that it was the duty of the plaintiff as fireman, to imperil his life by going into the building for Mrs. Paige, or that the act was not a very perilous one, maintains that it was in the nature of extra or extra hazardous services in the line or scope of his duty, and being so, the law will not permit him to contract for a reward for doing the act.

Says LYONS, J., in delivering the opinion of the court: "It is difficult to perceive how it can properly be said that it was within the scope or line of the plaintiff's duty to do the act, when it was not his duty to do it. It is conceded for the purposes of the case that it was his duty as a fireman to rescue Mrs. Paige from the flames if he could do so without hazarding his own life. It was not his duty to do so at the hazard of his life. Can it properly be said that it was in the line or scope of his duty to rescue her at the imminent peril of losing his life, when his duty did not require him to do so. We confess our inability to perceive any satisfactory grounds upon which this question may be answered affirmatively. In the law of agency we find that principals are often held responsible for the unauthorized acts of their agents, because such acts are within the scope of the authority of such agents; although not within their actual authority. The principal is held in such a case because he has clothed his agent with apparent authority to do the act, and a person to whom the agent is accredited may deal with him on the faith that he has the authority to bind his principal which he appears to have, and may hold the principal as effectually as though the agent had actual authority in the premises. Hence when it is said that a given act of an agent, although unauthorized, is within the scope of his authority, and therefore binds his principal, it only signifies that the principal has apparently given his agent authority to do the act, and as against a person dealing with the agent in good faith, he shall not be heard to deny the agent's authority. But where the question is one of duty, there seems to be no room for the application of any such principle. If it is not the duty of a person to render a specified service, we fail to comprehend how it can correctly be said that the service is within the line or scope of his duty—that is to say, that although it is not actually his duty to render the service—yet, because it is his apparent duty to do so, he shall be held to the same consequences as though it were his actual duty. It seems to us that the mere statement of the proposition is sufficient to show that it is untenable."

THE FORECLOSURE OF PLEDGES.

A pledge is something put in pawn or deposited with another as security for a debt or for the performance of some agreement; and the contract is confined to personal property.[1] Notes, bonds, stocks, and in general all kinds of personal chattels, may be given or delivered in pledge, and the mere delivery of a chattel or chose in action is sufficient.[2]

A familiar distinction made in the books between a pledge and a mortgage is, that in the case of a pledge, the title remains in the pledgor; while in the case of a mortgage, the title passes to the mortgagee, subject to be divested.[3] This time-honored discrimination has lost much of its force in those States where, as in Michigan, the true theory of the chattel mortgage is held to be analagous to that of real estate mortgages, and to constitute a mere lien upon property, the title to which still remains in the mortgagor;[4] while the almost universal statutory provisions requiring either an actual change of possession of the mortgaged property, or the filing or recording of the mortgage, remove another of the ancient distinctions between a mortgage and a pledge.

A pledge differs from a mere lien. The distinction is said to be that a mere lien can not be enforced by sale by the act of the party, but that a pledge is a lien with a power of

[1] Edwards on Bailment, sec. 176; Jones on Bailm., 118; Story on Bailm., sec. 286; Stearns v. Marsh, 4 Den. 227; Markham v. Jandon, 41 N. Y. 235.

[2] Edwards on Bailm., sec. 176; McLean v. Walker, 10 Johns. 472; Campbell v. Parker, 9 Bosw. 322.

[3] Brown v. Bement, 8 Johns. 98; Wood v. Dudley, 8 Vt. 435; Bonsey v. Ames, 8 Pick. 236; 2 Story Eq. Jur., sec. 1030; Jones on Chat. Mortgages, secs. 4-7.

[4] Kohl v. Lynn, 34 Mich. 360; Cary v. Hewitt, 26 Mich. 228; Lucking v. Wesson, 25 Mich. 443.

sale superadded.[5] But it is not the purpose of this article to deal with the nature of pledges in general, but simply with the question: How may a pledge be foreclosed? The solution of this problem depends quite largely upon the circumstances and conditions under which the pledge is given. In some cases, no agreement is made as to the conduct of the pledgee upon default, but the parties are left to to the rules of the common law; while in other cases, definite and specific provisions are declared in accordance with which the rights of the parties shall be adjusted.

I. It is proposed to consider first, the mode of foreclosure under the ordinary contract of pledge, where no particular provisions are made for that purpose by the parties.

Keeping in mind, then, the definition of a pledge as a bailment of personal property as security for some debt or engagement, it may be stated first, in general terms, that nonpayment of the debt at the stipulated time, did not work a forfeiture of the pledge either by the civil or at the common law. It simply clothed the pledgee with authority to sell the pledge and reimburse himself for his debt, interest and expenses, and the residue of the proceeds of the sale then belonged to the pledgor. The old rule, existing in the time of Glanvil, required a judicial sentence to warrant a sale, unless there was a special agreement to the contrary. But as the law now is, the pledgee may sell without judicial process, upon giving reasonable notice to the pledgor to redeem and of the intended sale; or he may file his bill in chancery for a foreclosure and proceed to a judicial sale. [6]

The pledgee's right to sell the pledge and apply the proceeds to the payment of his demand, is an implied authority arising from the nature of the transaction. The debtor intends that the security shall be made available and the proceeds applied, if necessary, to the satisfaction of the debt; and the law sanctions a sale by the pledgee under proper restrictions, as a safe and convenient mode of applying the pledge in payment of the debt.[7] Under the ordinary contract of pledge, the pledgee's right to sell, at common law, does not accrue until after a default is made in the payment of the debt secured, or in fulfilling the engagement. It is a breach of trust to sell the pledge before the debt becomes due, or before the principal obligation matures. His right to sell arises, like that of the mortgagee of chattels, upon default; until that occurs, he holds the property merely as a security. The right to foreclose, or to sell the pledge, is a remedy given to the creditor to enforce the principal obligation; the pledgee can not therefore resort to either of these remedies until his right accrues to enforce that principal obligation. [8]

Supposing, then, that default has occurred in the conditions of the pledge made under the ordinary contract, without any express stipulation between the parties as to the mode of procedure, in what way may the pledgee avail himself of the benefit of the security?

1. The pledgee may, after the debt becomes due, sell the pledge without resorting to judicial process; but before he can proceed to such a sale under the usual contract of pledge, he must demand payment of the debt; he must call upon the pledgor to redeem, and must give him a reasonable opportunity to do so. The right to sell is conditioned upon a prior demand, and is to be exercised in a reasonable manner, after giving the pledgor a reasonable time to redeem the pledge. Hence a waiver of notice of sale, embodied in the contract or pledge, does not dispense with the necessity for such prior demand, and the rule is the same where the principal debt is already due. The law requires a demand so that the pledgor may redeem, and thus save himself from a sacrifice of his property on a forced sale. It also requires that the pledgee shall give the pledgor

[5] Walter v. Smith, 2 Barn & Ald. 439; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; s. c., 7 Am. Rep. 341.

[6] Stearns v. Marsh, 4 Den. 227; Cortleyon v. Lansing, 2 Caines Cas. 204; 7 Am. Dec. 296; 2 Kent's Com. 581, 582; Tucker v. Wilson, 1 P. Wms. 261; Lockwood v. Ewer, 2 Atk. 303; Johnson v. Varnon, 1 Bailey's S. C. Rep. 527; Perry v. Craig, 3 Mo. 516; Parker v. Brancker, 22 Pick. 40; Story's Eq. Jur., sec. 1008; Hart v. Ten Eyck, 2 Johns. Ch. 100; Patchin v. Pierce, 12 Wend. 61; Garlick v. James, 12 Johns. 64; 7 Am. Dec. 294; Edwards on Bailm., sec. 279.

[7] Pigot v. Cubley, 15 C. B. (N. S.) 701; Cortleyon v. Lansing, 2 Caines Cas. 200; 7 Am. Dec. 297; Doane v. Russell, 3 Gray (Mass.), 382; Garlick v. James, 12 Johns. 146; 7 Am. Dec. 294; Robinson v. Hanley, 11 Iowa, 410; Patchin v. Pierce, 12 Wend. 61; Hart v. Ten Eyck, 2 Johns. Ch. 62; Nelson v. Edwards, 40 Barb. 279.

[8] Dykers v. Allen, 7 Hill, 497; Johnson v. Stear, 15 C. B. (N. S.) 330; Spaulding v. Barnes, 4 Gray (Mass.), 330.

notice of the time and place of the proposed sale, so that he may be present, if he see fit, and prevent the sale by a redemption.[9] There does not appear to be any reason to prevent the demand of payment being made at the time the notice of sale is given. As steps prerequisite to a sale, they are not to be confounded; the object of the demand is to prevent a sale by rendering it unnecessary, and the object of a notice of sale is to enable the debtor to take proper measures to insure a fair sale, and both must be reasonable in point of time.[10]

To authorize a sale by the pledgee, the notice given to the pledgor must be a personal one. As to what shall be deemed a reasonable notice, there appears to be no established rule, but this must be determined largely by the nature of the goods pledged. The cases agree that a sale may be had on a reasonable previous demand and notice of the time and place of sale, and that the object of this notice is to give the pledgor an opportunity to redeem, or to attend the sale for the purpose of seeing that the property is not sacrificed.[11] This being the object, it is evident that what would be a reasonable notice in one case, might be entirely inadequate in another. Thus stocks might be sold upon the Stock Exchange with entire safety upon a much shorter notice than merchandise pledged could be sold in a remote inland district.[12]

It has been thought that a notice similar to that required on execution sales of similar property would be sufficient, upon the presumption that what the law would consider adequate notice to protect the rights of an execution debtor, ought to be sufficient to protect a pledgor. The sale, taking place under these circumstances, must be open and public. It must be made at public auction, at a place open to the general public, and under circumstances fitted to insure a sale for an adequate price.[13]

The property to be sold should be present, subject to inspection and examination, and should be sold in bulk or in parcels, as will best realize the largest sum therefor, and no more should be sold than is necessary to satisfy the debt.[14] The pledgee should not buy the pledge himself, and he should take all proper and customary precautions, in the time and manner of sale, of notice or advertisement, and the like, to protect effectually the pledgor's interest and property.[15] A party holding a pledge as security for a debt owing to himself, is under no obligation to proceed and sell within any given time, nor is he bound in the first instance to resort to the property for the payment of the debt.[16] He may also, if he see fit, collect his debt by levying upon and selling the property pledged.[17]

Until an actual foreclosure, the pledgor has always the right to redeem the pledge by paying the amount due. If no time is fixed for the redemption of the pledge, the pledgor may redeem at any time, and the right of redemption survives on his death to his legal representatives, against the pledgee and his representatives.[18] A pledgee has, however, no right under the above rules, to sell notes or ordinary choses in action. The law infers that the true intent of the transaction in cases of this kind is, that the pledgee shall receive the moneys on the securities as they fall due, or collect them by suit, and, out of the proceeds thus arising, to satisfy his claim.[19]

[9] Wilson v. Little, 2 N. Y. 443; Genet v. Howland, 45 Barb. 560; Hanks v. Drake, 49 Barb. 186; Markham v. Jandon, 41 N. Y. 235; Stevens v. Hurlbut, 31 Conn. 146; Davis v. Funk, 39 Pa. St. 243; Milliken v. Dehon, 27 N. Y. 334; Merwin v. Hamilton, 6 Duer, 244; Lawrence v. Maxwell, 53 N. Y. 19; Stanton v. Jerome, 54 N. Y. 480; Ogden v. Lathrop, 65 N. Y. 158; Parker v. Brancker, 22 Pick. 40; Mowry v. Wood, 12 Wis. 413; Gay v. Moss, 34 Cal. 725; Washburn v. Pond, 2 Allen, 473; Bryan v. Baldwin, 52 N. Y. 233.

[10] Howe v. Bemis, 2 Gray (Mass.), 203; Genet v. Howland, 45 Barb. 560; Parker v. Brancker, 22 Pick. 40; Washburn v. Pond, 2 Allen (Mass.), 474.

[11] Lewis v. Graham, 4 Abbott's Pr. 106; Wheeler v. Newhold, 5 Duer, 29; 16 N. Y. 392; Brass v. Worth, 40 Barb. 462; Strong v. Nat. Bank Asssociation, 45 N. Y. 718, Markham v. Jandon, 41 N. Y. 235; Brown v. Ward, 3 Duer, 660, and cases cited above.

[12] Willoughby v. Comstock, 3 Hill, 389; Bryan v. Baldwin, 7 Lans. 174; Baltimore F. Ins. Co. v. Dalrymple, 25 Md. 242; Vose v. Florida Ry. Co., 50 N. Y. 369.

[13] Brown v. Ward, 3 Duer. 660; Schepeler v. Eisner, 3 Daly, 11.

[14] Cresson v. Stout, 17 Johns. 116; Bruce v. Westervelt, 2 E. D. Smith, 440; Sheldon v. Soper, 14 Johns. 352; Howard v. Ames, 3 Met. (Mass) 311; Fitzgerald v. Blocker, 32 Ark. 742; 29 Am. Rep. 3.

[15] 1 Story's Eq., secs. 308-323; 2 Parson's on Cont., 120.

[16] Granite Bank v. Richardson, 7 Met. 407; Case v. Boughton, 11 Wend. 106; Elder v. Rouse, 15 Wend. 218; Butterworth v. Kennedy, 5 Bosw. 143; Rozett v. McCellan, 48 Ill. 345; Townsend v. Newell, 14 Pick. 332.

[17] Buck v. Ingersoll, 11 Met. 226; Arendale v. Morgan, 5 Sneed. 704.

[18] Perry v. Craig, 3 Mo. 516; Cortelyon v. Lansing, *supra*.

[19] Joliet Iron Co. v. Scioto Fire Brick Co., 82 Ill.

But it may, and does often happen that, by reason of the pledgor's absence, or of inability to find him, the pledgee is unable to demand payment, or to give the notice of sale required. In such cases, the pledgee can not proceed by the ordinary sale at all, but must resort to judicial proceedings to foreclose the pledge. A bill in chancery, similar in its nature to the bill for foreclosure of a mortgage, is the proper procedure, and it must be resorted to in all cases when the pledgor is absent and can not be found.[20]

2. But, second, the remedy by notice and sale is not the only one which the pledgee has in these cases. As before stated, he may elect to sell the chattel pledged, or he may file his bill in equity against the pledgor for a foreclosure and sale. We have seen above that under some circumstances this is the only remedy; but even where the pledgee might foreclose by notice and sale, a bill in chancery is often the more advantageous proceeding. Parsons says: "It is safer and better to have a judicial sale by a decree in chancery whenever the State courts have power to make such decree." [21] This mode of foreclosure is certainly safer in cases of pledges of large value, as the courts watch any other sale with great vigilance and jealousy, and any irregularity may bring the validity of the sale by notice into question.[22] As the practice is similar to that of the foreclosure of mortgages, it is unnecessary to describe it.

II. It is now proposed to consider the second branch of the topic, namely, the course to be pursued where the parties, at the time of the bailment, have declared how the pledge may, or shall, be foreclosed.

An agreement by the debtor that the pledge shall become the property of the creditor on mere default, or failure to pay the debt secured, is illegal, as the creditor is not allowed to stipulate for a forfeiture.[23] Subject to this rule of law, the parties are free to make any lawful agreements they may see fit as to the manner, time, place and circumstances of the foreclosure. They may waive demand or notice of sale, or both; they may agree that only a certain notice need be given, or that a particular notice shall be given; they may provide that the sale may, or shall, be in public or in private; at a designated place, or at any place that may suit the pledgee's convenience, and a foreclosure made in pursuance of such agreement will be valid.[24]

These agreements in regard to peculiar modes of foreclosure are of very frequent occurrence. Pawnbrokers have usually a printed contract, or "pawn ticket," which the pledgor signs, and which contains the terms and conditions of the pledge. A very common custom in the pawning or pleding of stocks, is for the pledgee to take the pledgor's note, acccompanied by the ssocks, and containing a recital that the pledgor has deposited with the pledgee, "as collateral security, with authority to sell the same at the broker's board in New York City, at public or private sale, or otherwise, at his option, on the nonperformance of this promise, and without notice, ten shares Erie Railway stock." [25] If the conditions prescribed are made imperative, they should be strictly followed, and a foreclosure made in any other way would, in most cases, be ineffectual; but when the method designated is optional, there is nothing to prevent the pledgee's proceeding to foreclose by notice and sale, or by bill in chancery, as the circumstances may require.

To summarize, therefore, it is found that the following rules are laid down:

I. In the case of the ordinary pledge, where no express provision has been made by the parties in regard to the method of foreclosure,it is held:

1. The pledgee may file his bill in equity

584; s. c., 25 Am. Rep. 311; Wheeler v. Newbold, 16 N. Y. 392; s. c., 45 N. Y. 720; Nelson v. Edwards, 40 Barb. 279; Nelson v. Wellington, 5 Bosw, 178; Jessup v. City Bank, 14 Wis. 331.

20 Garlick v. James, 12 Johns. 146; s. c., 7 Am. Dec. 294; Strong v. National Bank Ass'n., 45 N. Y. 718; Stearns v. Marsh, 4 Denio, 227; Cortelyon v. Lansing, 2 Caine's Cas. 200; 7 Am. Dec., 296.

21 2 Parson's on Cont., 120.

22 Story on Bailm., sec. 310; Hart v. Ten Eyck, 2 Johns. Ch. 62.

23 Lucketts v. Townsend, 3 Tex. 119; Williamson v. Culpepper, 16 Ala. 211; Walker v. Staples, 5 Allen (Mass.), 34; Kimball v. Hildredth, 8 Allen, 167; Jessup v. City Bank, 14 Wis. 331.

24 Milliken v. Dehon, 10 Bosw. 325; Genet v. Howland, 45 Barb. 560; Flanders v. Chamberlain, 24 Mich 405; Wylder v. Crane, 53 Ill. 490; Dykers v. Allen, 7 Hill, 497; Rankin v. McCullough, 12 Barb. 103; Ins. Co. v. Dalrymple, 25 Md. 242, 269; Willoughby v. Comstock, 3 Hill, 389; Brown v. Ward, 3 Duer. 660; Bryson v. Rayner, 25 Md. 424.

25 Vose v. Florida R. Co., 50 N. Y. 369; Milliken v. Dehon, 27 N. Y. 364; Rankin v. McCullough, 10 Barb. 103; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; Jarvis v. Rogers, 13 Mass. 105; s. c., 15 Mass. 389; Ogden v. Lathrop, 65 N. Y. 158.

against the pledgor, and have a decree for foreclosure and sale, or

2. He may sell without judicial process, by demanding payment of the debt, and giving the pledgor reasonable previous notice of the time and place of the sale, or

3. If the pledgor is absent, or can not be found, the pledge must proceed to a judicial sale by bill and decree in equity.

II. In cases where the parties have agreed upon the mode of foreclosure:

1. The pledgee must follow that method where it is imperative; or,

2. He may follow it, or pursue either of the above modes, when it is optional.

Battle Creek, Mich. F. R. MECHEM.

EQUITABLE CONSIDERATION.

It is now a well settled general rule that a mere moral obligation is not a sufficient consideration to support an express promise.[1] For many years the contrary doctrine prevailed in England,[2] and was sanctioned to some extent in America;[3] but, as is well shown by Mr. Chitty in his work on Contracts, the older English cases apparently supporting it were, with almost the single exception of Lee v. Muggeridge, not authoritative, the expressions to that fact being mere *dicta*, and the decisions sustainable on other grounds.[4] The rule laid down in these cases was often criticised, and gradually limited in its application. In 1840 it was completely overthrown, and the rule as it exists to-day was adopted as the law of the land.[5] The statement of the rule made by the reporter in the note to Wennall v. Adney, was then approved, as it has often been since, and no clearer statement of the law can well be made. It was said: "An express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of action, if the obligation on which it is founded could never have been forced at law, though not barred by any legal maxim or statute provision."[6]

This principle applies only where the original cause of action is barred by act of law. Where it has been extinguished by the act of the parties, a new promise founded on no other consideration may be binding in morals, but is not in law.[7] A distinction is also to be made between the cases where the obligation is one founded on a natural right or duty merely, and not enforceable at law, and those where it is supported by an antecedent valuable consideration. In the former, the consideration is insufficient to support a promise; in the latter, it is sufficient.[8]

In some of the cases the term "equitable consideration" is used instead of the usual expression, "moral consideration," and I think this should be encouraged.[9] Had this distinction been made earlier, it would have prevented much confusion and seeming conflict in the authorities. The term "moral consideration" is, at best, a very vague one; and, as used in many cases to include consideration founded on both moral and legal obligation, is often misleading. It is submitted that a moral consideration is one founded on a duty which one owes, and which, in good morals, one ought to perform, but which is not legally binding. An equitable consideration may be defined to be a valuable consideration once existing, but incapable of enforcement because of some positive rule of law, or some provision of statute. The subsequent promise made after the right to en-

[1] 1 Parson's on Cont., 434; 1 Add. on Cont., sec. 13; 1 Dan. on Negot. Instr., sec. 182; Bishop on Cont., sec. 453; Wennall v. Adney, 3 Bos. & Pul., 247; Cook v. Bradley, 7 Conn. 57; Dodge v. Adams, 19 Pick. 429; Freeman v. Robinson, 9 Vroom, 383; s. c., 20 Am. Rep. 399; Greenabaum v. Elliott, 60 Mo. 25; Wills v. Ross, 77 Ind. 1.

[2] See Hawkes v. Saunders, Cowp. 290-294; Lee v. Muggeridge, 5 Taunt. 36; Atkins v. Barnwell, 2 East, 506; Suffield v. Bruce, 2 Stark. Rep. 175.

[3] Montgomery v. Lampton, 3 Metc. (Ky.) 519; Musser v. Ferguson, 55 Pa. St. 475; Glass v. Beach, 5 Vt. 173.

[4] Chitty on Cont., * 45 *et seq.*

[5] Eastwood v. Kenyon, 11 Ad. & El. 438; Beaumont v. Reeve, 8 Q. B. 483; Jennings v. Brown, 9 M. & W. 496-501.

[6] See Chitty on Cont., * 46; Wiggins v. Keizer, 6 Ind. 252; Ehle v. Judson, 24 Wend. 97; 2 Langd. Cas. on Cont., 1025, note 71, *et seq.*

[7] Shepard v. Rhodes, 7 R. I. 470; Ingersoll v. Martin, (Md. Ct. App.) 14 Cent. L. J. 397; Warren v. Whitney, 24 Me. 561; Valentine v. Foster, 1 Metc. 520; Snevely v. Read, 9 Watts. 396. But see Willing v. Peters, 12 Serg. & R. 188; Stafford v. Bacon, 25 Wend. 384.

[8] 1 Bouv. on Inst., 241, sec. 623; Loomis v. Newhall, 15 Pick. 159; Updike v. True, 13 N. J. Eq. 151; Lonsdale v. Brown, 4 Wash. C. C. 86.

[9] Wills v. Ross, 77 Ind. 1, Flight v. Reed, 1 Hurl. & C. 702.

force the original one has been lost by operation of law, reaches back to and revives the original consideration. When this takes place, there is more than a moral obligation; there is a valuable consideration as well.

If this distinction be made, and the above definitions be accepted as correct, the general rule on this subject will then be: An equitable consideration will support a promise, but a mere moral obligation will not.

An examination of the cases will show the scope and practical operation of our rule. If a debt is barred by a discharge in bankruptcy, and a promise is afterwards made to pay it, the consideration growing out of the debt existing before the bankruptcy, is an equitable consideration, and the promise is supported by it.[10] It is sufcient in such cases if the promise be made after the adjudication, even though no certificate of discharge has been obtained;[11] and it has been held under the Bankrupt Law of 1867, that if made any time after the filing of the petition, a new promise is binding. [12]

So, a claim once founded on a valuable consideration, but not enforceable because of the bar created by the Statute of Limitations, will constitute an equitable consideration which will support a subsequent promise to pay the original debt. It is to be remarked, however, that the promise must be distinct and unequivocal, and made to the party interested, and not to a stranger. [13]

An action may be maintained on a contract voidable by the Statute of Frauds, where a new promise is made in writing;[14] so, where a subsequent guaranty of payment was made in writing for goods furnished under a previous verbal guaranty, it was held binding on the guarantor. [15]

Upon the same principle, it is held that a verbal contract will support a conveyance made by an insolvent debtor as against creditors who attack it on the ground of fraud. [16]

There are other cases that might be cited as illustrating this rule, as where one on coming of age promised to pay a debt contracted during his infancy;[17] or where a county treasurer's accounts were settled and became a judgment, and subsequently an innocent error was discovered in favor of the county, which he promised to correct;[18] but perhaps the strongest illustration is afforded by the case of Flight v. Read, cited above. It was there held that although a contract was void at the time it was executed, under the provisions of the Statute of Usury then in force, a subsequent promise made after the repeal of the statute, was supported by a sufficient consideration and might be enforced.[19] As showing what are mere moral considerations, may be cited the case of Mills v. Wyman,[20] where a son who was of age was taken sick among strangers, and his father wrote a letter to them promising to pay them for taking care of him; or the case of Cook v. Bradley,[21] where necessaries were furnished the father for which his son afterwards promised to pay. So, a promise to pay an annuity in compensation for the injury caused by past seduction or cohabitation, is founded on a mere moral consideration and is not enforceable [22] Without multiplying citations, it may be said generally, that in all cases where the original contract is merely voidable, but otherwise founded on a valuable consideration, a promise to discharge it will be valid; but if

[10] Evans v. Carey, 29 Ala. 109; Dusenbury v. Hoyt, 53 N. Y. 521; Giddings v. Giddings, 51 Vt. 227, Shockey v. Mills, 71 Ind. 289; s. c., 36 Am. Rep. 196 and note; Dewey v. Moyer, 72 N. Y. 70; Turner v. Chrisman, 20 Ohio, 332; Maxim v. Morse, 8 Mass. 127; Allen v. Ferguson, 18 Wall. 1.

[11] Roberts v. Morgan, 2 Esp. 736; Otis v. Gazlin, 31 Me. 567; Hornthal v. McRae, 67 N. C. 21; Cook v. Shearman, 103 Mass. 21; Hill v. Trainor, 49 Wis. 537.

[12] Katz v. Moessinger, 7 Ill. App. 536. But see, Stebbins v. Sherman, 1 Sandf. (Sup. Ct.) 510; Thornberg v. Dils, (Ky.) 14 Cent. L. J. 396.

[13] Pierce v. Seymour, 52 Wis. 272; Kisler v. Saunders, 40 Ind. 78; Sibert v. Wilder, 16 Kan. 176; s. c., 22 Am. Rep. 280; Wacheler v. Albee, 80 Ill. 47; Allen v. Collins, 70 Mo. 138; s. c., 35 Am. Rep. 416, and note 417, where many authorities are collected and reviewed.

[14] De Colyar Guaranties, 37.

[15] Wills v. Ross, 77 Ind. 1; Wilson v. Marshall, 15 Ir. C. L. 466.

[16] Brown v. Rawlings, 72 Ind. 505; Livermore v. Worthrup, 44 N. Y. 107; Hyde v. Chapman, 33 Wis. 391; Bump. Fraud. Convey. 220.

[17] Hawkes v. Saunders, Cowp. 289.

[18] Stebbins v. County of Crawford, 92 Pa. St. 289; s. c., 37 Am. Rep. 687.

[19] See, also, Jones v. Jones, 6 M. & W. 84; Doyle v. Reilly, 18 Ia. 108; Little Rock v. Bank, 98 U. S. 308; s. c., 18 Am. Law Reg. 390.

[20] Wills v. Wyman, 3 Pick. (Mass.) 207. And see, Friar v. Hardenbough, 5 Johns. 272; Story on Cont., secs. 134, 135, and 159, 166.

[21] Cook v. Bradley, 7 Conn. 57. Also, Parker v. Carter, 4 Munf. 273.

[22] Binnington v. Wallis, 4 B. & Ald. 650; Beaumont v. Reeve, 8 Q. B. 487.

the original contract is void, it is otherwise.[23]

As will be seen from these authorities, the rule now established is one well calculated to insure justice. While on the one hand, the law will not undertake to decide questions of morality or ethics, neither, on the other hand, will it permit one who has at one time secured value, to avoid a promise made to account for that value, although some positive rule of law may have made the original contract incapable of enforcement. W. F. ELLIOTT.

Indianapolis, Ind.

[23] 1 Dan. Negot. Instr., sec. 182; 1 Add. Cont., sec. 13, note 1; Williams v. Moore, 11 M. & W. 263; Eastwood v. Kenyon, 11 A. & E. 438.

DANGEROUS PREMISES — LIABILITY OF OWNER, WHEN CONTROLLED BY LESSEE.

SAMUELSON v. CLEVELAND IRON MINING CO.

Supreme Court of Michigan, October 11, 1882.

The owner of a mine contracted with certain persons to work it, but stipulated that the contractors and not the owner should be responsible for any injuries to workmen and the responsibility was assumed by the contractors. The mine was in proper condition when the contractors took possession, and there is nothing in the contract to lead workmen to suppose that the owner retained control of it or was responsible for their protection unless it were a stipulation that when the contractors repaired the mine the work should be done under the supervision of a person designated by the owner. *Held*, in an action against the owner for an injury to a workman, that this stipulation was not that the owner should supervise but that he should have the right to supervise, and was for the protection of the owner; that the neglect of his own interests was not a legal wrong to others, and that plaintiff has no right of action.

Error to Marquette.

Geo. W. Hayden, for plaintiff in error; *W. P. Healy*, for defendant in error.

COOLEY, J. delivered the opinion of the court:

This action was instituted to recover damages of the defendant for negligently causing the death of John P. Samuelson, the plaintiff's intestate. The declaration avers that defendant, on June 10, 1879, and for a long time prior thereto, was owner of an iron mine in Ishpeming, in which was a certain underground pit called No. 5; that the intestate on the day named, and for a few preceding days, was employed therein as a common miner under Selwood & Williams, who, under and by the direction of defendant, were working said pit and employing men for the purpose; that the defendant assumed and had entire charge and control over all safety arrangements in said pit and in the mine, directing the placing of all pillars, had the care of timbering and bracing therein when necessary, and the determination of all questions relating to the safe condition of said pit, and the duty devolved upon said company to said intestate in his said employment to see at all times that said pit was safe, and that examinations were made for that purpose from time to time, and that defendant assumed all risks to said intestate in his said employment arising from dangers occurring in said pit which might be remedied by care and skill; that the roof of said pit was of soap-stone, which was a dangerous rock for roof support, of slight cohesiveness, liable at all times to crumble and fall, and that the roof in question required constant care, attention and examination in order to keep the same in a reasonably safe condition, and to prevent the same from falling on the workmen below, and that supports and timbers ought to have been placed under it to make it safe, but defendant neglected and refused to place them; that on the day named, while intestate was at work in said pit, a large quantity of rock fell from said roof without any fault or negligence of said intestate, but by and through the fault and negligence of defendant, which struck and killed the intestate. And plaintiff avers that the death was caused by the wrongful conduct, carelessness, negligence and default of defendant, and she claims damages therefor.

The circuit judge was of opinion that no case was made for the jury, and accordingly directed a verdict for the defendant.

Liability on the part of defendant is claimed on two grounds: First, that defendant being the owner of real estate which it was unsafe to venture upon, invited the intestate and others upon it without apprising them of the danger, and that the death occurred in consequence; and, second, that the defendant owed a duty to all persons employed in the mine to be vigilant in guarding against dangers and that this duty was wholly neglected.

The declaration states that the mine at the time was being worked by Selwood & Williams. It appears that this was under a written contract bearing date May 1, 1878, made by defendant with E. A. Johnson & Co., to whom Selwood & Williams succeeded, whereby the contractors were to have the working of the mine, and deliver the ore to the defendant for a certain specified price per ton. The material parts of the contract, so far as they are important to this controversy, are following—the parties of the first part mentioned therein being E. A. Johnson & Co. and the party of the second part the mining company:

"The quality of such ore shall be satisfactory to the superintendent (for the time being) of said second party, and shall be delivered in shipping cars on the railroad track at the mine during the shipping season, and at such other times as said second party may designate, and shall also be dumped into carts and sleighs, or stock piled at

the option of said superintendent of said second party. Such mine shall be worked in a careful, prudent and workmanlike manner, to the entire satisfaction of said superintendent; and in case it is not so worked, and left in a bad condition at the termination of this contract, then said second party shall have the right and is hereby authorized to put the said mine in the condition it should and would be if so worked in a good workmanlike manner, at the expense of said first parties, and retain the costs thereof out of any moneys in its hands belonging to said first parties; and whereas, iron mining in Marquette county, including said mine, is essentially a dangerous business, where accidents and injuries to the miners and their employees are likely to occur at any time, it is therefore hereby agreed that the relationship hereby created between the parties hereto is that of contractor and contractee, and not that of master and servant. It is the duty of the said first parties to be on watch for danger at all times, either from slides, falls of rock, derangement of the skips, or of the machinery, and any and all other causes of danger in the mine. And in case said first parties regard any place as dangerous, they shall not be compelled to carry on any mining at such place. It shall be their duty to take down all rock or ore making any place where they are working dangerous; and when they find any dangerous ground it shall be their duty instantly to report such dangerous place to said superintendent, to the end that he may supervise the removal of the dangerous rock, or take such other steps to make such place safe; that is to say, as safe as a mine can be expected to be, as there can be no absolute safety in an iron or other underground mine. The parties of the first part, in consideration of the letting to them this contract, and for the price to be paid them for the ore mined, hereby agree to assume for themselves and their employees all risks of danger or accident, no matter from what cause the same may arise, and all precautions taken against the danger or accident in said mine shall be done by said first parties, the said second party only furnishing the place to mine—the making of it safe hereby devolving on said first parties under the supervision, advice and direction of said superintendent, for which no charge will be made by said second party.

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"Nothing herein shall be construed as creating any liability on the part of said second party for any debts, damages or other liabilities incurred by said first parties hereunder; and in case said second party is made liable for any act, omission, misfeasance, or negligence of said first parties, or any or either of them, in the working of said mine, then said first parties shall reimburse and save harmless said second party, and said second party may retain enough of said earnings of said first parties in its hands to pay any such liability."

The defendant insists that so long as the mine was being worked under this contract all responsibility for the care and safety of the mine was upon the contractors, and that they alone were charged with any duty for the protection of the workmen. If the mine were in an unsafe condition when it was handed over to the contractors, and this was known to defendant, or by the exercise of proper care ought to have been known, and if in consequence a miner who was brought there in ignorance of the danger was killed, the defendant should be held responsible. Every man who expressly or by implication invites others to come upon his premises, assumes to all who accept the invitation the duty to warn them of any danger in coming, which he knows of, or ought to know of, and of which they are not aware. This is a very just and very familiar principle. Southcote v. Stanley, 1 Hurl. & N. 247; s. c., 38 Eng. L. & Eq. 295; Indermaur v. Dames, L. R. 1 C. P. 274, and L. R., 2 C. P. 181: Francis v. Cockerell, L. R. 5 Q. B. 184; Elliott v. Pray, 10 Allen, 378; Coughty v. Woolen Co., 56 N. Y. 124; s. c., 15 Am. Rep. 387; Tobin v. Portland, etc., R. Co., 59 Me. 183; Latham v. Roach, 72 Ill. 179; Gillis v. Pennsylvania R. Co., 59 Pa. St. 120; Malone v. Hawley, 26 Cal. 409; Deford v. Keyser, 30 Md. 179; Pierce v. Whitcomb, 48 Vt. 127; s. c., 21 Am. Rep. 120. But we search in vain in this record for any evidence that the defendant is chargeable with negligence in inviting miners into a dangerous mine. That the mine was at no time a place of absolute safety is conceded; but the danger was not peculiar to this mine, and by itself raised no presumption of negligence. The contract with Johnson & Co. truly affirmed that mining was intrinsically a dangerous occupation.

The question is whether defendant at the time of delivering possession to the contractors had neglected any precaution which ought to have been taken to guard against danger. We find no evidence of such neglect. The roof remained in place during the season of 1878, and the tendency of the plaintiff's evidence is to show that the freezing of the following winter and the filtration of the water through it were chargeable with the disintregation and ultimate fall of the rock. The negligence, if any, must on this showing have consisted in the failure to inspect the roof frequently, and to bar down any rock that seemed likely to detach itself fall, and or to erect timbers to prevent the fall. But plaintiff insists further that this duty of supervision and care at all times rested upon the mining company, and was not devolved upon the contractors by the agreement made with them. This is the point on which the plaintiff chiefly relies. It is not pretended that the mere ownership of real estate upon which there are dangers will render the owner liable to those who may receive injury in consequence. Some personal fault must be involved, or neglect of duty, before there can be a personal liability. As between landlord and tenant the party presumptively responsible for a nuisance upon the leased premises is the tenant. Todd v. Flight, 9 C. B. (N. S.) 377; Swords v. Enger, 59 N. Y. 28;

s. c., 17 Am. Rep. 295. But this might be otherwise if the lease itself contemplated the continuance of the nuisance, for in that case the personal fault of the landlord would be plain. Smith v. Elliott, 9 Pa. St. 345; Helwig v. Jordan, 53 Ind. 21; Grady v. Wolsner, 46 Ala. 381.

In such a case the party injured might treat both landlord and tenant as wrong-doer. Irvine v. Wood, 51 N. Y. 224; s. c., 10 Am. Rep. 603; Pillsbury v. Moore, 44 Me. 154; McDonough v. Gilman, 3 Allen, 264; Morris Canal, etc. Co. v. Ryerson, 27 N. J. 457. And where the duty to keep premises in safe condition is upon the owner, it is no excuse that the danger is attributable to the personal fault of a contractor or of any third person; it is sufficient to charge that he has negligently failed to guard against it. Pickard v. Smith, 10 C. B. (N. S.) 470, is an illustration. The defendant was occupier of refreshment rooms at a railway station, and the opening to his coal cellar was in the platform over which passengers passed from the cars. This was left uncovered by the coal merchant who was putting coal into the cellar, and a traveler fell in. The defendant was held liable. The ground of liability is briefly stated: "The defendant employed the coal merchant to open the trap in order to put in coals; and he trusted him to guard it while open, and to close it when the coals was all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted, and the fact of his having intrusted it to a person who also neglected it, furnishes no excuse in good sense or law." Water Co. v. Ware, 16 Wall. 566, and Hale v. Railway Co., 6 Hurl. & N. 488, are also illustrations of the principle that a party upon whom a clear duty rests, can not relieve himself of the consequences of neglect to perform it by intrusting performance to another.

Corby v. Smith, 4 C. B. (N. S.) 566, was a case where a land owner had given another person permission to place materials in a private road across the land, and he was very properly held responsible for the consequences. Cases like Lanning v. New York Cent. R. Co., 49 N. Y. 521; Ford v. Fitchburg R. Co., 110 Mass. 240, where masters are held liable for injuries from the negligent use of defective machinery, are all cases where the duty which has been neglected is personal to the master himself, and can not be delegated. The street cases in which cities have been held liable for the careless conduct of contractors all rest on the same ground, that a duty has been neglected which was the duty of the principal. Creed v. Hartman, 29 Y. 591, is cited for plaintiff as having a bearing upon this case. There the defendant had contracted for an excavation in a public street, and had made the contractors stipulate to guard against all accidents and to make good all damages; but he was nevertheless held liable to one who had fallen into the excavation. But the ground of the liability was stated by one of the judges to be, that the excavation itself was wrongful: "The defendant was therefore liable for the injury which the excavation produced, to third persons, without fault on their part, whether the workmen were guilty of negligence or not. The basis of the defendant's liability is his own wrongful act in procuring the excavation to be made without authority, and not the negligence of the contractor or his workmen in performing or guarding the work."

The mining in this case was rightful in itself, so that all cases like the one just referred to have no bearing. The contract for the working of the mine provided for its being carefully and prudently worked, and no negligent injury would have occurred had its provisions been observed. It can not therefore be said that defendant should be liable on the ground that the injury was a natural and probable result of its contract. It is not shown that the roof was in a dangerous condition when possession of the mine was delivered under the contract, and the evidence tends to prove the contrary. It remains to be seen, then, whether a personal duty to guard against danger to the miners was still incumbent upon the defendant as owner of the mine, and was continuous while the mine was being worked by the contractors. Mere ownership of the mine can certainly impose no such duty. The owner may rent a mine, resigning all charge and control over it, and at the same time put off all responsibility for what may occur in it afterwards. If he transfers no nuisance with it, and provides for nothing by his lease which will expose others to danger, he will from that time have no more concern with the consequences to others than any third person. If, instead of leasing, he puts contractors in possession, the result must be the same, if there is nothing in the contract which is calculated to bring about danger. But if, on the other hand, he retains charge and control, and gives workmen a right to understand that he is caring for their safety, and that they may rely upon him to guard against negligent conduct in the contractors and others, his moral accountability for their safety is as broad as it would be if he were working the mine in person; and his legal accountability ought to be commensurate with it.

But we do not find that in this case there was any such retention of charge and control, or that the arrangement between the contractors and the mining company gave to workmen any assurance that the company would protect them against the negligence of the contractors and their servants. The terms of the contract are very full and specific in their negation of any such assurance; for the contractors expressly assume all such risks themselves; and any workman made aware of the terms of the contract would understand that the mining company had taken special precautions to relieve itself of the duty upon a supposed breach of which this action is based. If, notwithstanding

the contract, the duty of protection still rests upon the mining company, it is because no stipulation in the contract, however carefully worded, could prevent it.

If the terms of the contract were such, when all its stipulations were considered, as to leave the charge and control of the mine and its operations in the hands of the owner, we should agree that it must be responsible for the negligent failure to guard against dangers, and that any stipulations to the contrary would be futile. We are to judge of an arrangement by its substance, and not by what it is called in the papers of those who make it. If a man is principal in a transaction, he can not relieve himself of the obligations of a principal by stipulating that he shall only be known and considered as an agent or servant. Nothing that is black can be made white by simply calling it so. This is as plain in law as it is elsewhere.

But in the case of leasing this mine, there was nothing to preclude the contractors assuming the complete control if they saw fit to do so. The question is whether they have done so in fact. Upon this controversy could arise, were it not for the provision in the contract, that the making the mine safe should be under the supervision, advice and direction of defendant's superintendent. This the plaintiff claims is conclusive. If this clause could have no office except to retain control in the hands of the mining company while professedly repudiating it, and would be otherwise idle and meaningless, the argument which is made for the plaintiff upon it would appear unanswerable. But other reasons are both apparent and cogent. Aside from any consideration of humanity, which might induce any one in delivering over to another a dangerous property to stipulate for some personal oversight, the mining company had abundant reason in its own interest. Negligent management might not only expose lives to peril, but might ruin the mine itself. Daily vigilance was important to preclude such a disaster, and the owner who had been working and was familiar with it, would understand the weak point better and know better what was required to protect them than any persons new to the mine. The owner would also be more interested than another in being wary and vigilant. There is ample reason in these facts for demanding and insisting upon some right of supervision. But the supervision does not make the owner principal in the mine, or master in the working of it. The owner assumes towards no one the duty to supervise; he does not stipulate to supervise; he only contracts for a privilege. If the mine owner in this case had dismissed the superintendent and sent no one to inspect the working, no miner could complain that a duty owing to him was being neglected. The company had not promised to protect him, or to indemnify him for injuries; on the contrary, it had expressly stipulated that it should assume no such responsibility. The privilege of intervention for its own protection was reserved; but the neglect of one's own interest is no wrong to others. Legal wrongs must spring from neglect of legal duties. Reedie v. Railway Co., 4 Exch. 244, is in point here.

The conclusion is that the plaintiff has no right of action. Whether there was negligence on the part of any one we do not consider. The judgment must be affirmed.

The other justices concur.

STREETS — RIGHTS OF ABUTTING LOT OWNERS—ELEVATED RAILWAYS—CONSTITUTIONAL LAW.

STORY v. NEW YORK ELEVATED RY. CO.

New York Court of Appeals, October 17, 1882.

1. Where a city conveyed building lots abutting on a street, the fee of which was in the city, with the covenant that it should forever thereafter continue and be for free and common passage as a street, the owner of such a lot has a right in the street which amounts to an easement.

2. That the erection of an elevated railway in a street is inconsistent with its use as a street, and constitutes such an appropriation of the adjoining lot owner's easement of the passage as is forbidden by the constitutional inhibition of the taking of private property for public purpose without compensation.

Action for injunction. The opinion states the case.

John E. Parsons and *Wm. M. Evarts*, for appellant; *David Dudley Field*, for respondent.

TRACEY, J., delivered the opinion of the court:

The principal question to be determined in this case is, Has the property of the plaintiff been taken for public use within the meaning of the Constitution of this State? The plaintiff claims that by the true construction of the deed from the city of his original grantors the bed of Front (then Water) street, was included in the grant, and that he is now the owner of the fee of one-half of the bed of Front street in front of his lots. But if this claim be not sustained then he insists that in the original grant of the premises in question, the City of New York covenanted with his grantors that Front street should be and remain an open street forever; that this covenant being for the benefit of abutting lands is one running with the land, and the right or privilege secured thereby constitutes property within the meaning of article 1, section 6, of the Constitution, which provides that "private property shall not be taken for public use without just compensation." The plaintiff's lots, Nos. 7 and 9, abutting on Front street, were formerly water lots, or lands under water. These lots and the streets were a part of a larger tract owned by the city, which prior to 1773, it caused to be surveyed and laid out into streets and lots, and designated upon a map. In May and December, 1773, the city granted and conveyed one of the plaintiff's lots, with other

lands, to one De Peyster, and the other lot to one Ellison. The boundary of the grant on one side began at Dock street, extending easterly across the street, then shown on the map as Water (now Front) street, to what would be the westerly limits of the East river when the land should be filled in and the streets mentioned in said grant made and constructed. The plaintiff's lots are described as being upon the side of Water (now Front) street, as by the survey made of these and sundry other lots by Gerald Bancker, dated the 10th day of November, 1772, and filed in the office of the town clerk, as will more fully appear, with the appurtenances thereto belonging and appertaining. The grantees covenanted and agreed to widen Dock street fifteen feet, and to build and construct a good and substantial street as so widened; to make and construct Water (now Front) street, and also to build and erect a good, substantial dock, or street, on the outward boundary of their respective grants, and the deed then declares "which said several streets shall forever thereafter continue and be for the free and common passage of, and as public streets and ways for the inhabitants of the said city, and all others passing through or by the same in like manner as streets of the same city now are, or lawfully ought to be."

The trial court finds that the grantees made and constructed the several streets mentioned in the grant, and that the plaintiff is now the owner of said lots, upon which is erected a warehouse, occupying the entire front, and four stories high. The defendant insists, and the trial court found, that by the true construction of the deed the bed of Front street was excepted therefrom, and never passed to the plaintiff's original grantors. The necessary effect of the construction of the grant is to make the covenant found therein that the several streets shall forever thereafter continue to be public streets a covenant of the city, and not of the grantees, for we must assume that the covenant was made by the party who held the title to the bed of the street, and therefore had power to control its use, and not by one who had no title, and consequently no such power. If the bed of the street was included in the grant, and the title thereto passed to the grantees, then it is even more clear that the covenant must be deemed the covenant of the city, the land designated on the map as a street with other lands on both sides thereof and abutting thereon, being conveyed to private persons, could not become a street except by proceedings taken for that purpose, or by a dedication of it by the owners to the public use, and its acceptance by the public. Mere dedication is not enough; lands so dedicated do not become a public street until accepted by the public authorities. The construction of the street by the grantees in performance of the covenant on their part would amount to a dedication of the street to public use. The covenant of the city that the streets when constructed should be and remain public streets forever, constitutes an acceptance by the city of the lands thus dedicated. City of Oswego v. Oswego Canal Co., 6 N. Y. 257; Lee v. Sandy Hill, 40 Id. 442; Requa v. Rochester, 45 Id. 129.

Assuming the construction placed upon the grant of the court below to be correct, we have to consider the effect of such a covenant in a grant of land made by a municipal corporation having authority to lay out and open streets, and to acquire lands for that purpose. Where an individual conveys village or city lots designated upon a map as abutting upon a public street, the map being referred to in the deed, it is well settled that the grantee acquires, as against the grantor, a right of way over the strip of land referred to as a street, although the same may not in fact be a public street, not having been accepted by the public as such; yet, as between the parties to the grant, the land is deemed to have been dedicated to the public by the grantor, and he can not thereafter appropriate said lands to any use inconsistent with their use as a public street. Oswego v. Oswego Canal Co., 6 N. Y. 257; Cox v. James, 45 Id. 557; Smyles v. Hastings, 22 Id. 217; 2 Wend. 472; 1 Id. 262. The same rule applies to the State or a municipal corporation where it deals with its lands as owners or proprietors. City of Oswego v. Oswego Canal Co., *supra*. In the case of 1 Wend. 262, the court says: "In such a case the grantee obtains a perpetual right of way over the space called a street." In 2 Wend., *supra*, in such a case the court says: "A covenant will be implied that the purchaser shall have an easement or right of way in the street to the full extent of its dimensions." The City of New York having power to lay out and open streets, and to acquire lands for such purposes, had power to dedicate its own lands to such uses, and to bind itself by a covenant with its grantees of abutting lands, that a particular street should forever be kept as a public street. What interest then, if any, did the grantees acquire in the bed of the street by such grant and covenant? M purchased land in a village adjoining a public street, and it was at the same time agreed between him and the grantor that a triangular piece of land belonging to the latter on the opposite side of the street, and in front of the land sold, should never be built upon, but should be deemed public property; and the grantor executed to the grantee a deed of the land sold and a bond for the performance of the agreement as to the triangular piece of land, both instruments being proved and recorded. H afterwards purchased of the grantee the land opposite to triangular piece, after being informed by him of the privilege secured by the bond held by the chancellor, that H was entitled to the benefit of the agreement, and that the grantee could not without his (H's) consent be permitted to make a new arrangement with the holder of the legal estate in the triangular piece, by which buildings should be erected thereon; that this right or privilege constituted an easement in the triangular piece. It was further held that easements are annexed

to the dominant tenement and pass to the grantee of such estate. It was also held that they are also a charge upon the estate of the servient tenement, and follow such an estate into the hands of those to whom such servient tenement or any part thereof is conveyed. The same question was again before the chancellor in the cases of Trustees of Watertown and White v. Cowen and Bagg, where it was again held that a grantee of a lot adjoining a public square, who has a special covenant from the original owner of the ground that it shall be kept open for the benefit of his land, may restrain the grantor from violating the covenant. It was also held that a covenant in a deed of land not to erect a building on a common square owned by the grantee in front of the premises conveyed is a covenant running with the land, and was the grant of a privilege or easement which passed to a subsequent grantee of the estate without any special assignment of the covenant. The principle of these cases was recently affirmed by this court in the case of Phœnix Ins. Co. v. Continental Ins. Co. In the case last cited H conveyed land to S by deed, and the grantee covenanted for himself, his representatives and assigns, not to erect or cause to be erected any building, or erection on a certain specified part of the premises conveyed, which adjoined the remaining land of a grantee, and it was held, all the judges concurring, that such a covenant, both in respect to the burden and the benefit, adheres and follows the respective parcels of land through all the devolutions of title, and the right to enforce the covenant passed to the plaintiff as subsequent grantee of H of the dominant tenement, and the covenant would be enforced by a court of equity against a subsequent purchaser of the servient tenement, who purchased with notice of a covenant. These cases are directly in point, and it follows that by the laws of this State, as interpreted and held by its highest courts for the last fifty years without criticism or doubt, the grantees of the city, by force of their grant, acquired the right to have Front street forever as a public street. The street has thus become what is known to the common law as the servient tenement, and the lots abutting thereon the dominant tenement. Such servitude constitutes a private easement in the bed of the street attached to the lots abutting thereon and passed to the plaintiff as the owner of such lots. That an easement is property within the meaning of the Constitution can not be doubted. This was expressly adjudicated in this court in the case of Arnold v. Hudson River R. Co. Arnold owned a nail factory together with the right to take a certain quantity of water from a creek and to convey it over or under the surface of intervening lands to such factory to propel machinery. For this purpose he built a trunk about six feet above the surface, through which the water was conveyed. In 1850 the defendant having acquired title to a portion of the intervening lands, constructed tracks thereon, removed the portion of the trunk over said surface without Arnold's knowledge and constructed another trunk under the lands through which the water was conveyed, and then raised by a penstock into the old trunk near the factory. The court held, by the concurrence of all the judges voting, that Arnold's easement was property within the meaning of article 1, section 6 of the Constitution, and therefore could not, nor could any portion of it, be taken for public use without compensation. In Doyle v. Lord, 64 N. Y. 432, this court held that a lessee of a store had an easement for the purpose of light and air in a yard attached to the building. In Sixth Avenue R. Co. v. Kerr, 72 N. Y. 330, this court also held that an easement in a public street may be condemned and taken for a public use.

The next question to be considered is, has the plaintiff's property been taken by the defendant within the meaning of the Constitution of this State? To constitute such a taking, it is sufficient the person claiming compensation has some right or privilege secured by grant in the property appropriated to the public use, which right or privilege is destroyed, injured or abridged by such appropriation. Has the plaintiff's easement in Front street been destroyed or injured by the appropriation of the street to the uses of the defendant's road? As we have seen, the plaintiff acquired nothing more than a right to have the street kept as a public street, and this must be deemed to be held subject to the power of the legislature to regulate and control the public uses of the street. This brings us to the question whether the occupation of the street by the defendant's road is compatible with or destructive of its use as a public street. Front street is about forty-five feet in width, the roadway between the curbstones being about twenty-four feet wide. The trial court has found as a fact that the defendant's road is to be constructed upon a series of columns about fifteen inches square, fourteen and a half feet high, placed about five inches inside the edge of the sidewalk, and carrying cross girders which support four sets of longitudinal girders, upon which are placed cross-ties for three sets of rails for a steam railroad; that the girders are thirty-nine inches deep, the longitudinal girders thirty-three inches deep; that the line of columns abridges the sidewalk and correspondingly interferes with the street and thoroughfare where such columns are located thereon; that the structure, as proposed on Front street, will fill so much of the carriage-way of the street as is about fifteen feet above the roadway. The effect of such structure the court finds will be to some extent to obscure the light of the abutting premises opposite to it, and will to some extent impair the general usefulness of the plaintiff's premises and depreciate their value.

Can the street be lawfully appropriated to such a structure without making compensation to the plaintiff for his easement therein? This is a question of power. If the legislature has power to authorize such a structure without compensation,

its exercise can not be regulated by the courts. If one road may be authorized to be constructed upon two series of iron columns placed in the street, another may be authorized to be supported upon brick columns or upon brick arches spanning the street. If a superstructure may be authorized which spans the entire carriage-way at fifteen feet above the bed of the street, one may be authorized which spans the entire street from building to building, thus excluding light and air from the street and from the property abutting thereon. Thus an open street would be converted into a covered way, and so filled with columns or other permanent structures as to be practically impassable for vehicles. The city undertook and agreed with the plaintiff's grantors that Front street, when constructed by them, should forever thereafter continue and be kept as a public street in like manner as other streets of the same city now are lawfully or ought to be. This fixes with definiteness and precision the character of the street which the parties to the contract intended to secure. As the other streets of the city were, or lawfully ought to be, so this street was to be. It was to be an open street, one which would furnish light and air to the abutting property and a free and unobstructed passage to the inhabitants of the city.

A covenant to keep a strip of land open as a public street forever, is a covenant not to build thereon, and brings this case directly within the principle of the cases of Hill v. Miller, Phœnix Ins. Co. v. Continental Ins. Co., Trustees of Watertown and White v. Cowen and Bagg, *supra*. While the legislature may regulate the uses of the street as a street, it has, we think, no power to authorize a structure thereon which is subversive of and repugnant to the uses of the street as an open public street. Whether a particular structure authorized by the legislature is consistent with the uses of the street as a street, must be largely a question of fact, depending upon the nature and character of the structure authorized. The court below found that the series of iron columns abridge the street, and the superstructure erected thereon obscures the light to the adjoining premises and depreciates the value of the plaintiff's property. The extent to which plaintiff's property is appropriated is not material; it can not, nor can any part of it, be appropriated to the public use without compensation. We think such a structure closes the street *pro tanto*, and thus directly invades the plaintiff's easement in the street as secured by the grant of the city. Whatever view be taken of the facts of this branch of the case, the same result must be reached. If the title to the bed of the street passed to the grantees of the city, then the public acquired a mere easement in the street, resulting from its dedication to public use, the easement resting upon the express covenant of the owners of the fee, that the street shall be kept as a public street forever. The fee remained in the owner making the dedication, and he having sold lots abutting upon the street, the purchaser, as we have already seen, obtained a perpetual right of way over the space called a street, to the full extent of its dimensions. Whether the bed of the street was excepted from the grant of the city, and the title thereof never vested in the grantees, or whether the bed of the street was included in the grant and passed to such grantees is of little importance, as in either event the plaintiff has a private easement of a right of way in the street, coupled with an express covenant that the entire space marked on the map as Front street, shall forever be kept as a public street. The defendant's railroad, as authorized by the legislature, directly encroaches upon the plaintiff's easement and appropriates his property to the uses and purposes of the corporation. This constitutes a taking of property for public use. It follows that such a taking can not be authorized except on condition that the defendant makes compensation to the plaintiff for the property thus taken. The conclusion here reached is not in conflict with the determination of this court in the case of People v. Kerr, 27 N. Y. 188; Kellinger v. Forty-second Street Railroad, 50 Id. 206, and other similar cases. We agree with Church, C. J., in the case last cited, that "it is not quite clear as to what was intended to be decided by the court in People v. Kerr, relative to the rights of abutting owners. In that case, all of the private parties were abutting owners upon streets that had been opened under the act of 1813, whereby the city acquired the fee of the street," in trust; nevertheless that the same be appropriated and kept open for or as part of a public street, avenue, square or place forever, in like manner as the other public streets in said city are or of right ought to be. The only question which could have been there presented and detremined, so far as the abutting owners were concerned, was whether the use to which the street was appropriated by the act authorizing the construction of what are known as horse or street railroads, appropriated the streets to a use inconsistent with their uses as open public streets. Whether the rights of abutting owners in the street were invaded, depended upon the nature and extent of the interest acquired by the public in the lands embraced therein. It is well settled that the State, in exercise of the right of eminent domain, or a corporation having the delegated power, may acquire such an interest or estate as in the judgment of the legislature the public services may demand. Heyward v. Mayor of New York, 3 Seld. 314. It may acquire the property in fee-simple absolute, or a qualified fee, or an easement merely, or the right to a temporary or permanent use of the property (Sixth Avenue R. Co. v. Kerr, 72 N. Y. 333), and the compensation to be made is regulated by the extent of the interest acquired. The proceedings by which land is acquired by the exercise of the right of eminent domain amount to a statutory conveyance of the same to the public or the corporation, and there is no distinction between such a con-

veyance and a voluntary conveyance made for a public use. Where property is acquired for public use by proceedings *in invitum*, the statute which authorizes the acquisition constitutes the contract between the citizen and the public; and when the interest has once been acquired, it can not be changed or enlarged without further compensation. It is only when the title is acquired in fee-simple absolute that the property may be converted to other public uses, or the particular use ceasing, it may be sold and conveyed and converted to private uses. Heyward v. Mayor of New York, 3 Seld. 314; Brooklyn Park Commissioners v. Armstrong, 45 N. Y. 239. But where the public acquire, not the property itself, but the mere right to use it for a particular purpose, the title of the former owner is not extinguished; but is so qualified that it can only be enjoyed subject to the easement. In such a case, the title of the public is limited to the particular use, with the powers and privileges incident thereto; such as the right to use the timber and soil for the purpose of constructing or maintaining the street. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber and earth, and may enjoy the beneficial ownership of the fee for every purpose not incompatible with the public use for which the land was taken, and may maintain trespass, ejectment or waste (Jackson v. Hathaway, 15 Johns. 477), and the use ceasing, the title reverts to the former owner, freed from the public easement.

By the act of 1813, the city acquired the fee in the street, in trust, however, for a particular public use. Conceding that this trust is for the benefit of the abutting owner as well as for the public, the only right which he has in the street is the right to insist that the trust be faithfully executed. So long as the street is kept open as a public street, the abutting owner can not complain. The question presented in the case of People v. Kerr was whether the particular structure there authorized was inconsistent with the continued use of the streets as open public streets of the city. Whether it was or not was a question of fact dependent upon the nature and character of the structures therein involved. The court found and determined that it was not inconsistent with the public uses of a public street, but was in aid of such uses. And in Kellinger v. Forty-second Street R. Co., 50 N. Y. 206, this court limits the decision in the case of People v. Kerr to a "simple declaration that the legislative authority to construct a railroad on the surface of the street without a change of grade was a legitimate exercise of the power of regulating the use of public streets for public uses." The question whether the abutting owners upon streets opened under the act of 1813 had the right to prevent their being converted to a use destructive of their existence as public streets, was not deemed by the court to be involved in that case. This appears from the report of the case. Davies, J., did not sit in the case. Rosekrans, J., was of the opinion that the power of the legislature extended only to governing the mode of passing upon the surface of streets, and Judges Balcom and Marvin, concurring in the result, stated that "there might be a private right in the owners adjoining the street to have free access to their premises, held under the original proprietor of the tract embracing the street, of which said owner could not be deprived by the assent or surrender of the public, or of the general owner of the fee in the street, or both, without compensation for his incidental interest or easement in the street. This they said to preclude the conclusion that any such interest had been disregarded. They saw no such question in the case."

But the question which was not seen to be involved in that case is the only question involved in the case now under consideration. The question here presented is not whether the legislature has the power to regulate and control the public uses of the public streets of the city, but whether it has the power to grant to a railroad corporation authority to take possession of such streets and appropriate them to uses inconsistent with and destructive of their continued use as open public streets of the city Had the act in that case authorized the corporations to take permanent and exclusive possession of portions of the streets to build sidings, and to permanently occupy them with rows of cars standing in front of the stores and residences of abutting owners, and to erect permanent depot buildings within the limits of the streets for accommodation of their passengers, we can not doubt that a different result would have been reached in that case. The fact that a particular structure is found to be consistent with the uses of a street is no evidence that a different structure is not inconsistent with such uses.

The conclusion reached in the present case is based upon the character of the structure here involved. The language of Wright, J., in People v. Kerr, that the abutting owners have no property, estate or interest in land forming the bed of the street in front of their respective premises to be protected by the right of eminent domain, must be construed with reference to the point then being considered. This court had held in the case of Williams v. New York Cent. R. Co., 16 N. Y. 107, that where the public had acquired a mere right of way over the land of another, the laying down of railroad tracks and constructing a steam railroad in the streets of a city was an enlargement of the use understood and contemplated by the parties at the time the land was acquired, and imposed an additional burden upon the fee, and that such act could not be authorized without compensation to the owner. This case was cited and relied upon in support of the claim of the abutting owners, but the answer was that the abutting owners did not own the fee of the street; that such fee being in the public the legislature might lawfully appropriate it to any public use consistent with the trust for which it was held, notwithstanding such use of a street may

not have been known or contemplated at the time the land was acquired. Having parted with the fee, the abutting owner could not maintain trespass or waste, and against an act which did nothing more than to impose an additional burden upon the fee, he could not invoke the inhibition of the Constitution, that private property shall not be taken for public use without compensation. Thus understood we think the language of Wright, J., is not subject to criticism, and furnishes no support to the claim now made that the owner, whose lands were taken and are now held in trust, to be appropriated and used as open public streets forever, has no standing in court to insist that the trust shall be kept and that the streets shall not be destroyed. This precise question was before the Supreme Court of the United States in the case of Railroad Company v. Schurmeir, 7 Wall. 272. In deciding the case that court says: "Attempt is also made to justify the acts of the respondents (the railroad company) as grantees of the State, upon the ground that the complainant in dedicating the premises to the public as a street, levee and landing, parted with all his title to the same, and that the entire title rested in fee in the State. Resdondents rely for that purpose upon the statute of the territory of Minnesota. Suppose the construction of that provision, as assumed by the respondents, is correct, it is no defense to the suit, because it is nevertheless true that the municipal corporation took the title in trust impliedly, if not expressly, designated by the act of party in making the dedication. They could not, nor could the State convey to the respondents any right to disregard the trust or to appropriate the premises to any purpose which would render valueless the adjoining real estate of the complainant."

That this trust, created by the act of 1813, was intended to be for the benefit of the abutting owner as well as for the public we can not doubt. City property has little or no value disconnected from the streets upon which it abuts. The opening of a city street makes the property abutting thereon available for purposes of trade and commerce, and greatly enhances its value. The act of 1813 proceeds upon the assumption of this well known fact, and the damages sustained by reason of the taking were assessed in view of the trust assumed by the public, that such lands were to be kept as open public streets forever. The public did not assume to take the lands in fee simple absolute, but took and paid for a lesser estate, and in pursuance of the theory of the statute that the abutting owner has a special interest in the street, the cost of the lands was immediately assessed back upon the abutting property. All the owner has ever received for the lands taken under this act is the benefit accruing to his abutting property by reason of the trust for which the lands are held. Having surrendered his land in consideration of the trust assumed by the public, if the trust can now be abrogated and the streets surrendered to the uses and purposes of a railroad corporation, it follows by authorities that private property may be taken for public use against the consent of the owner, and without compensation. We have examined the other cases cited by the learned counsel for the respondent, and in none of them do we find authority for the claim here made. The case of Transportation Company v. Chicago, 99 U. S. 635, is not in point. The injury there complained of was necessarily done in the extension of a city street. The interruption was temporary, ceasing with the completion of the work. This case is decided upon the elementary principle that the public have a right to make such use of the land taken for a street as may be deemed necessary for its proper construction, repair or maintenance. Within this power is included the right to fix the grade of the street and to change such grade from time to time as the necessities of the public may require; but whether the grade be elevated or depressed it is still a public street, to which the public have the right of free access, subject to such police regulations as may be adopted by the public authority having charge and control of the same.

The argument has been pressed upon our attention with great ability, that as railroads, like streets, are intended to facilitate trade and commerce, and lands taken for either are taken for public use, the legislature may, in its discretion, appropriate the public streets of our cities to the railroad corporations, and this without reference to the form of their structure or the extent of the injury wrought upon property abutting thereon. This is a startling proposition and one well calculated to fill the owners of such property with alarm. It can not be that the vast property abutting on the streets of our great cities is held by so feeble a tenure. This court has repeatedly held that such a rule has no application where the abutting owner owns the fee of the bed of the street, and we are of opinion that in cases where the public has taken the fee, but in trust to be used as a public street, no structure upon the street can be authorized that is inconsistent with the continued use of the same as an open public street. The obligation to preserve it as an open street rests in the contract written in the statute under which the lands were taken, and which may not be violated by the exercise of any legislative discretion. Whatever force the argument may have as applied to railroads built upon the surface of the street without change of grade, and where the road is so constructed that the public is not excluded from any part of the street thereof, is has no force when applied to a structure like that authorized in the present case. The answer to the argument is that the lands taken for a particular public use can not be appropriated to a different use without further compensation; that the authority attempted to be conferred by the legislature upon the defendant to take exclusive possession of portions of the public street, and to erect a series of iron columns on either side thereof, upon which a superstructure is to be

erected spanning the street and filling the roadway at fifteen feet above the surface, thus excluding light and air from the adjoining premises, is an attempt to appropriate the street to a use essentially inconsistent with that of a public street, and in respect to the land in question violates the covenant of the city made with the plaintiffs, grantors, and in respect to lands acquired under the act of 1813, violates the trust for which such lands are held for public use.

The argument drawn from the great benefit which these roads have conferred upon the city of New York, can have but little weight in determining the legal question presented in this case. No doubt these roads have added much to the aggregate wealth of the city of New York, and have greatly promoted the convenience of its citizens; but the burden of so great a public improvement can not rightfully be cast upon a few of its citizens by appropriating their property to the public use without compensation. The inhibition found in the Constitution against the right of the sovereign to appropriate private property to public use without making compensation therefor, was intended to secure all citizens alike against being compelled to contribute unequally to the public burdens. We are of opinion that the law under which the defendant is incorporated, authorizes it to acquire such property as may be necessary for its uses and purposes, upon making compensation therefor. This was substantially determined in the matter of the New York Elevated Road, 70 N. Y. 327. We have reached in this case the following conclusions:

First. That the plaintiff, by force of the grant of the city to his grantors, has a right or privilege in Front street which entitles him to have the same kept open and continued as a public street for the benefit of his abutting property.

Second. That this right or privilege constitutes an easement in the bed of the street, which attaches to the abutting property of the plaintiff, and constitutes private property within the meaning of the Constitution, of which he can not be deprived without compensation.

Third. That such a structure as the court found the defendant was about to erect in Front street, and which it has since erected, is inconsistent with the use of Front street as a public street.

Fourth. That the plaintiff's property has been taken and appropriated by the defendant for public use without compensation being made therefor.

Fifth. That the defendant's acts are unlawful, and as the structure is permanent in its character, and if suffered to continue will inflict a permanent and continuing injury upon the plaintiff, he has the right to restrain the erection and continuance of the road by injunction.

Sixth. That the statutes under which the defendant is organized authorize it to acquire such property as may be neeessary for its construction and operation by the exercise of the right of eminent domain.

Seventh. In view of the serious consequences to the defendant, we think no injunction prohibiting the continuance or operation of the road in Front street should be issued until the defendant has had a reasonable time after this decision to acquire the plaintiff's property by agreement or by proceedings to condemn the same.

ANDREWS, C. J., DANFORTH and RAPELLO, JJ., concurred; EARL, MILLER and FINCH, JJ., dissented.

WEEKLY DIGEST OF RECENT CASES.

ALABAMA,	3, 17
GEORGIA,	11
INDIANA,	5
ILLINOIS,	16, 20, 23, 24
IOWA,	12, 15
MICHIGAN,	10
NEW YORK,	14
OHIO,	6, 19, 21
PENNSYLVANIA,	4, 7, 8, 9, 25
WISCONSIN,	1, 18, 22
FEDERAL CIRCUIT COURT,	2
ENGLISH,	13

1. AGENCY—COLLECTION OF PRICE BY COMMERCIAL TRAVELER WHO SOLD THE GOODS—WANT OF AUTHORITY.

Where one Kilbourn, a commercial traveler, took from defendant an order for cigars, sent the order to plaintiffs, dealers in Chicago, who filled it and sent a bill of same with sixty days' credit to defendant, and where Kilbourn, about thirty days after shipment, requested and received payment from defendant for the cigars and receipted in the name of plaintiffs the bill which accompanied the goods: *Held*, that the apparent or ostensible authority of Kilbourn was only to solicit and send plaintiff's orders for goods, that he did not sell the goods, and that the circuit court erred in instructing the jury, 1. That Kilbourn, as agent of plaintiffs, made a sale of the goods to defendant, and was authorized so to do. 2. That if he did sell the goods, he had, therefore, authority to receive payment therefor. *McKindley v. Dunham*, S. C. Wis., October 10, 1882; 5 Wis. Leg. News, 54.

2. COMMON CARRIERS — INTERSTATE COMMERCE—FEDERAL REGULATION.

Section 4386 of the Revised Statutes of the United States, imposing a penalty upon railroads carrying sheep, swine, etc., if they allow such sheep, swine, etc., to be more than twenty-eight consecutive hours confined without unloading them for at least five hours for rest, water and feeding, does not apply to a railroad carrying sheep, swine, etc., from a point within a State to another point therein, but only to such as convey swine, sheep, etc., from one State to another. *United States v. East Tennessee, etc. R. Co.*, U. S. C. C., E. D. Tennessee, 1882, 13 Fed. Rep., 642.

3. COMMON CARRIER — SALE OF FREIGHT FOR CHARGES.

1. In making sale of freight for the charges due upon it for carriage, good faith and reasonable diligence must be observed to ascertain and give notice of the nature and character of such freight, so as to make the best sale possible. 2. If, knowing the contents of such package of freight, the

agent selling it withholds such knowledge from the public, and sells to a favorite to whom such knowledge has been communicated, at a nominal sum, such sale is a fraud, which will subject the perpetrators to an action for damages at the suit of the party injured. 3. A common carrier has no right, nor is there any duty resting on him, to examine the contents of barrels before advertising them for sale to pay freight charges. *Shivers v. Nathan*, S. C. Ala.; 1 Ala. L. J., 311.

CONTRACT—BOND—EXECUTION OF.

To charge as one obligor, who has signed a bond or written undertaking, it is not necessary that his name should appear in the body of such instrument, provided the intention that he shall be so charged appears clearly from its terms, taken in connection with the circumstances attending its execution. *Partridge v. Jones*, S. C. Pa., October 24, 1882; 3 Ohio L. J., 176.

5. CONTRACT—MATERIAL ALTERATION OF NOTE.

Frost, who was the bookkeeper of the appellees, went to Fort Wayne to secure a debt due his firm from Jacobson. Jacobson took two notes given to him by Frost, signed them, and also procured the appellant to sign them, and brought them back to Frost. The notes were written, "I promise to pay," and Frost, not thinking this form grammatical, as the notes were signed by two persons, requested Jacobson to go out and get appellant to sign his name on the back of the notes. This he declined to do, but told Frost to change the word "I" to "we" in the body of the notes, which Frost thereupon did without the knowledge or consent of appellant. This change was material, as it converted the notes from joint and several into joint notes, and appellant was released. Under the circumstances, Frost must be regarded as acting as the agent, and with the authority of the appellees, and his alteration of the note was not a mere spoliation. *Eckert v. Louis*, S. C. Ind., November 3, 1882.

CONTRACT—UNDER SEAL—RESCISSION BY PAROL.

A contract under seal for the purchase of real estate, where possession has not been delivered, may be rescinded by verbal agreement; but if the rescission is obtained by the fraudulent representation of the purchaser, no effect will be given to it; and it will make no difference that such fraudulent representation was a verbal proposition to purchase lands not enforceable under the statute of frauds. *Jones v. Booth*, S. C. Ohio, October 24, 1882; 3 Ohio L. J., 193.

7. CONVEYANCES—CONSTRUCTION OF DEED—RESERVATION.

1. The intention of parties to a deed may be ascertained (1) from the words of the grant, (2) from the surrounding circumstances, in which may be considered the position of the parties, and the subject of the grant at and subsequent to the transaction. 2. Where there is a reservation or restriction in a deed, it is to be construed most strongly against the grantor, and when the grantor asserts a reservation, the onus of showing it is upon him. *Grubb v. Grubb*, S. C. Pa., October 2, 1882; 14 Lanc. Bar, 85.

8. CONVEYANCES — CONSTRUCTION OF RESERVATION IN DEED—"MINERALS"—PETROLEUM.

A grantor of land excepted and reserved from his grant *inter alia*, "all minerals." *Held*, that the exception did not include petroleum or mineral oil. *Dunham v. Kirkpatrick*, S. C. Pa., Oct. 2, 1882; 12 W. N. C., 217.

9. CRIMINAL LAW—ASSAULT—RECKLESS AND WANTON CONDUCT—IMPLICATION OF MALICE.

A, while a passenger in a railway car filled with people, in a spirit of frolic, discharged a pistol, intending to shoot the load into the floor of the car, and thereby cause a temporary fright among the passengers. Without any intent on A's part, the ball from the pistol entered the foot of the prosecutor, inflicting a severe wound. At the time of the discharge the pistol was held downward, A standing in the aisle, and the prosecutor and other persons standing behind him and in close proximity to him. On the trial of A, for the above offense, upon an indictment alleging an assault: *Held*, that under the circumstances defendant's act being recklessly and wilfully done, the law would of itself imply malice. *Smith v. Commonwealth*, S. C. Pa., Oct. 2, 1882; 13 Pittsb. L. J. 114.

10. CRIMINAL LAW — ASSAULT WITH INTENT TO KILL.

A railway employee was sent with a party of men to repair a side track. A man, who claimed that they were coming upon his land, disputed the company's right to do what was proposed, threatened to undo whatever should be done, and in the course of an excited altercation drew a line on the ground where he said his boundary was, pushed the leader of the working party so that he staggered and then struck him a single blow with a heavy stick and knocked him down. There was some testimony that the person assailed had raised a shovel as if to strike the assailant, but this was denied. The assailant acted in hot blood, but apparently supposed that in trying to prevent what was proposed he was defending his right. *Held*, that although the blow was unjustifiable, the evidence would not sustain a charge of assault with intent to kill. *People v. Comstock*, S. C. Mich., Oct. 20, 1882; 13 N. W. R. 617.

11. CRIMINAL LAW—SELF-CRIMINATION—HOMICIDE.

In prosecution for murder: 1. Pulling the shoes and socks off the defendant's feet or inducing him to do it, would not render evidence touching their identification inadmissible. While a defendant can not be compelled to criminate himself by words or acts, yet in the case it seems he did not object to the shoes being taken off, and the police took them off in the discharge of their duty. 2. The shoes and socks as well as the knife found at the place of homicide were, of course, admissible, after identification. *Franklin v. State*, S. C. Ga., Oct. 31. 1882.

12. CRIMINAL LAW — TWICE IN JEOPARDY — ADJOURNED TRIAL.

Where the presiding judge in a trial for forgery, who was suddenly called to his home on account of the illness of his wife, after all the evidence had been introduced, temporarily adjourned the court, and a day or two later finally adjourned the court by telegram, it was *held* that the prisoner had not been in jeopardy, and could be tried at the following term of court upon the indictment. While a person may be said to be in legal jeopardy when he is put upon trial before a court of competent jurisdiction upon an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance—that is, when they have been impanelled and sworn,—there are some exceptions to this general rule; and when the jury, by necessity, is discharged on account of death or illness of the judge or of a juror, or from an inability of

the jury to agree upon a verdict, or the term expires by law before trial is finished, or the jury are discharged with consent of defendant, or a new trial is granted to him, he may again be put upon trial upon the same indictment. *State v. Tatman*, S. C. Iowa, Oct. 17, 1882; 13 N. W. R., 632.

13. CRIMINAL LAW—UNLAWFUL ASSEMBLY—DISTURBANCE OF THE PEACE—"SALVATION ARMY."
The appellants, with a considerable number of other persons, forming a body called the "Salvation Army," assembled together in the streets of a town for a lawful object, and with no intention of carrying out their object unlawfully, or by the use of physical force, but knowing that their assembly would be opposed and resisted by other persons in such a way as would in all probability tend to the committing of a breach of the peace on the part of such opposing persons. A disturbance of the peace having been created by the forcible opposition of a number of persons to the assembly and procession through the streets of the appellants and the Salvation Army, who themselves used no force or violence, it was *Held*, by Field and Cave, JJ. (reversing the decision of the justices), that the appellants had not been guilty of "unlawfully and tumultuously assembling," etc., and could not therefore be convicted of that offense, nor be bound over to keep the peace. *Held, also*, that knowledge by persons peaceably assembling for a lawful object, that their assembly will be forcibly opposed by other persons, under circumstances likely to lead to a breach of the peace on the part of such other persons, does not render such assembly unlawful. *Beatty v. Gillbanks*, Eng. High Ct., Q. B. Div., June 13, 1882; 47 L. T., 194.

14. DIVORCE—ADULTERY OF WIFE—CUSTODY OF CHILDREN.
Where a decree of divorce is granted upon the application of the husband for the reason of the adultery of his wife, she ceases whether or not the decree awards the custody of the children to the father, to have any right to the care, control, education or companionship of the minor children, and the court has no jurisdiction after final judgment to enjoin upon the husband or the children the company of the woman who has violated her marriage vows. *Crimmins v. Crimmins*, Supreme Ct. N. Y., 1882; 22 Daily Reg., 889.

15. EVIDENCE—TESTIMONY OF PRISONER IN HIS OWN BEHALF—COMMENTS OF PROSECUTING ATTORNEY.
A prisoner, by testifying in his own behalf, waives the protection which the statute forbidding the district attorney from commenting on his not testifying accords him, and the district attorney can properly call the attention of the jury to the fact that he has not testified as to a certain part of the case. *State v. Tatman*, S. C. Iowa, Oct. 17, 1882; 13 N. W. R., 630.

16. FRAUDULENT CONVEYANCES — PRIORITIES BETWEEN CREDITORS.
Creditors have the right to treat conveyances o their debtors made to hinder, delay or defraud them, as void, and their election to treat them as void is shown by attaching the property so conveyed, and such attachments, when levied, will become a lien upon the property with the same effect as if no fraudulent conveyances had been made. 2. By the levy of an attachment upon lands which have been fraudulently conveyed, for the debt of the grantor, the attaching creditor acquires a lien which is not disturbed by a decree in chancery setting aside the fraudulent conveyance, and subjecting the property to sale, for the payment of a judgment recovered by another creditor after the levy of the attachment. The levy of the attachment, before the recovery of judgment by the other creditor and the filing of his bill, creates a prior lien on the property. *McKinney v. Farmer's National Bank*, S. C. Ill., Sept. 27, 1882; 104 Ill. 180; Reporter's Advance Sheets.

17. FRAUDULENT CONVEYANCE—SECRET TRUST—ADVERSE POSSESSION.
1. The grantee, in a conveyance made for the purpose of creating a secret trust for the benefit of the grantor, is not clothed with any ownership or asserted right, which will uphold a claim of adverse possession. 2. Where a debtor has conveyed his lands with intent to delay, hinder and defraud his creditors, to another, and he sells a portion of the lands to a stranger, upon a bill to set aside the conveyance by the debtor as fraudulent, the land so sold to such stranger, can not be made subject to the complainant's debt, without making him a party defendant to the bill. *Jones v. Wilson*, S. C. Ala.; 1 Ala. L. J., 303.

18. MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANT IN SAME COMMON EMPLOYMENT.
The complaint alleges that plaintiff was employed by defendant company to accompany the defendant's express wagons and load and unload goods, etc.; that while so employed, by the direction of one Colvin, the agent and manager of said company's office in the city of Oshkosh, who, at the time of the injury, was driving, he was thrown to the ground and injured, because of negligence on the part of such driver. *Held*, that plaintiff and defendant's agent were co-employees. That the complaint does not state facts showing that the agent Colvin stood in the relation of vice-principal of the defendant. *Dwyer v. American Express Co.*, S. C. Wis., Oct. 10, 1882; 5 Wis. Leg. News, 43.

19. MECHANIC'S LIEN — WAIVER—IMPLIED CONTRACT—RUNNING ACCOUNTS.
1. The right to a mechanic's lien for labor or materials furnished for the erection or repair of a building may be waived by an agreement either expressed or implied. 2. Where no contract is shown except such as is implied from the running of mutual accounts between the parties for many years, with semi-annual settlements, a mechanic's lien can not be asserted on such accounts, the items of which generally were furnished for repairs upon machinery attached to a rolling mill. Other items, however, did not relate to repairs of the machinery or building. *Iron Company v. Murray*, S. C. Ohio, Oct. 3, 1882; 3 Ohio L. J., 195.

20. NEGLIGENCE—EVIDENCE—CUSTOM AS BEARING ON QUESTION OF COMPARATIVE NEGLIGENCE.
In a suit against a railroad company to recover damages for causing the death of the plaintiff's intestate, on the ground of negligence, it appeared that the deceased, at the time of the injury, was engaged in his duty of inspecting cars then standing in a yard kept for that purpose, and was under a standing car, examining the same, which, by being suddenly struck by other cars in motion, caused the injury resulting in his death. It further appeared, the defendant, in taking some of its cars to the yard, there to be left, detached them from the engine propelling them before entering the yard and suffered the cars, without any brakeman to

control their momentum, to enter the yard and strike the cars then standing on the track, and thereby causing the injury. It was also shown that the deceased, who was engaged as car inspector about the yard, placed no signal on the track to notify the switchman or any one else that he was engaged in inspecting the cars, and that no warning was given the deceased, by bell, whistle or otherwise, of the approaching cars. On the trial the defendant asked a witness what the custom was, at the time of the accident, in letting cars into the yard on tracks, and permitting them to run against standing cars, which the court refused to allow. *Held*, that the question was proper, as, if such was the custom, the answer would have aided the jury in determining the degree of care the deceased observed, and whether he was guilty of such negligence on his part as to prevent a recovery. *Pennsylvania Co. Stoelke*, S. C. Ill., Sept. 27, 1882; 104 Ill. 201; Reporters' Advance Sheets.

21. PARTNERSHIP—ADMINISTRATION OF PARTNERSHIP ESTATE—EXECUTOR OF SURVIVING PARTNER.

1. The executor or administrator of a surviving partner, who dies with partnership assets in his possession, and, while he is engaged in settling the partnership business, is entitled to the possession of such assets, and is charged with the duty of completing such settlement, unless relieved from that duty by contract, or by an order of a competent court. 2. He is not, as a matter of law, precluded from receiving compensation out of the partnership funds for his services in the performance of this duty. *Dayton v. Bartlett*, S. C. Ohio, October 17, 1882; 3 Ohio L. J., 182.

22. PRACTICE—JURY TRIAL—IMPROPER INFLUENCE OF COURT.

Where both parties having rested, and plaintiff's counsel having presented his case to the jury, the court said "I have just discovered a thing myself, and in the interest of justice I want to examine a witness," and called the court reporter, who testified to a close resemblance of the ink and pen in the line of erasure to that of another part of the bill, but could not say they were the same. *Held*, that undue weight was given such evidence by the court, and that the time and manner of its announcement to the jury was were calculated to prejudice them against plaintiffs, and was error. *McKindley v. Dunham*, S. C. Wis., October 10 1882; 5 Wis. Leg. News, 54.

23. STATUTE OF FRAUDS—VERBAL CONTRACT TO CONVEY LANDS.

A verbal agreement by a person to convey lands to another, in consideration that the latter would remain with her family on the place of the former, and make a home there for the owner so long as he should live, is within the statute of frauds, and equity will not enforce the same when there has been no performance that will take the contract out of the statute. *Preston v. Casner*, S. C. Ill., September 28, 1882; 104 Ill. 262; Reporters' Advance Sheets.

24. TRUST—CREATION OF—REQUEST OF OWNER TO HIS HEIRS TO CONVEY LAND.

The owner of lands wrote a letter to his brother, who was a prospective heir of such owner, requesting him and his sister, on the owner's death, to let a certain person have certain of his land for her kindness to him in sickness, and desiring them to see that his wishes as to the bounty be carried out, and subsequently wrote another letter to another person, showing more clearly that the former letter was a mere request, stating in the last letter further. "I give her my note for $4,000, against me or my estate. * * * * If my people refuse to give her the property, then they must pay the note." *Held*, that this created no trust in respect to the land in favor of the person to whom the owner wished it secured, and being a mere request as to what disposition should be made of a part of his property, it was obligatory on no one to perform it. *Preston v. Casner*, S. C. Ill., September 28, 1882; 104 Ill. 292; Reporter's Advance Sheets.

25. TRUST—SPENDTHRIFT TRUST—ATTACHMENT—ALIMONY.

1. A father may by a trust so provide for a son that neither the trust fund nor the income shall be liable to the claims of his creditors. 2. Where, by the terms of the trust, the fund and the income are expressly exempted from all liabilities whatever, the accrued income in the hands of the trustee is not liable to an attachment execution issued to enforce a decree for alimony *pendente lite*. *Thackara v. Mintzer*, S. C. Pa., Oct. 2, 1882; 14 Rep., 568.

NOTES.

—Crabb Robinson, just called to the bar, told Charles Lamb, exultingly, that he was retained in a cause in the King's Bench. "Ah!" said Lamb, "the first great cause least understood."

—The horn which summons the students and barristers of Middle Temple to dinner, has been lent by the benchers of the Inn to the Horners Company, to be shown at the exhibition of hornware now being held at the Mansion House.—*Law Journal.*

—At one of the trials in which Sir Robert Christison was engaged, one of the points for the defence was that there was no trace of the poison (strychnia) found in the body. In answer, Sir Robert said he knew of a substance so deadly that a minute dose of it would infallibly prove fatal, and so subtle that the most careful examination would fail to detect its presence in any of the tissues. He was about to name the substance, when the presiding judge begged him to keep so important a secret to himself, lest it should be used successfully for criminal purposes. Sir Robert used to tell in after years how for days his breakfast table was loaded with letters begging to know the secret.

—According to the latest returns from Somerset House, no less than 12,914 solicitors have taken out their certificates in England for the purpose of practicing during the present year. Of these 4,663 practice in London. When we read these figures it is not surprising to find, as the fact is, fully competent solicitors in England content to work for years as managing clerks for salaries of from $700 to 1,000 a year, only, perhaps, at the end to buy themselves into a firm at a premium of several thousand pounds.—*Can. L. J.*